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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-216

OCTAVIO SAENZ,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 7, 1975

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

OCTAVIO SAENZ,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the conviction of the Petitioner of two counts of violation of 18 U.S.C. § 1623 was handed down on April 21, 1975. *United States v. Saenz*, 511 F.2d 766 (5th Cir. 1975) A copy of the opinion is contained in the appendix.

JURISDICTION

Judgment of the Court of Appeals was entered on April 21, 1975. The Motion For Rehearing was filed on May 5, 1975 and was overruled on June 9, 1975. On July 15, 1975, Mr. Justice Powell ordered that the time for filing petition for writ of certiorari be extended to and including August 8, 1975. The Supreme Court has jurisdiction under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. Whether The Evidence Supports The Conviction Of Petitioner.

II. Whether The Issue Of The Materiality Of Grand Jury Testimony Is One Of Law Or One Of Fact.

III. Whether Testimony Before A Grand Jury That Is Investigating Offenses Occurring In Another District Can Be Material To A Matter Properly Before The Grand Jury.

IV. Whether The Testimony Of Petitioner Had A Natural Effect Or Tendency To Influence, Mislead or Dissuade The Grand Jury In Its Investigation.

STATUTORY PROVISIONS

Title 18 U.S.C. § 1623, Fed. R. Crim. Pro. 18 and the United States Constitution Article III § 2 and Sixth Amendment are contained in the appendix.

STATEMENT OF THE CASE

The Petitioner Octavio Saenz was convicted of two counts of making false material declarations before a grand jury in violation of Title 18 U.S.C. § 1623(a). He was sentenced to five years imprisonment and fined $10,000.00. Saenz is and has been the mayor of the City of Benavides in Duval County, Texas since 1955. (R. 147-148) The testimony in question was given before a grand jury that was investigating tax evasion by George B. Parr. *United States v. Parr*, 509 F.2d 1381 (5th Cir. 1975) The indictment alleged that Saenz lied about the reason why he received a $5,000 check from a City of Benavides account and whether he had instructed the Mercantile Bank of Dallas to transfer funds to the First State Bank of San Diego.

The testimony of Saenz before the grand jury that is contained in the indictment is an extraction consisting of few sentences from testimony that covered many pages. More of the testimony before the grand jury is contained in the appendix. The emphasized testimony alleged to be perjury in the indictment in count one gives a false impression as to what the sum total of the Petitioner's testimony was. He explained to the grand jury that the city council did not specifically authorize a compensation of $5,000, but rather that they informally agreed that he would receive some compensation if and when the city was able to pay it. Saenz testified before the grand jury that the city council did not know of the $5,000 withdrawal. (R. 188)

Saenz testified before the grand jury that he asked the city council if they didn't think he was entitled to compensation for his work as mayor. (R. 184) Accord-

ing to him, the city council agreed that he was entitled to compensation, but that the amount was left up to him. (R. 185) He further testified that this was just a friendly discussion at one of the meetings. (R. 186) Saenz admitted that there was never a vote on any compensation. (R. 188) At one point, Saenz was asked if he really expected the grand jury to believe that he was authorized by the city to pay himself $5,000.00. (R. 193)

Count two of the indictment contains testimony of the Petitioner that he did not know how much money was to be deposited in the City of Benavides account and that he did not know when it was to be deposited. There is no evidence in the record to show that he did in fact know these things. The second count of the indictment also contains grand jury testimony that the Defendant did not leave any instructions with the Mercantile Bank of Dallas to transfer any surplus in their bank to the First State Bank of San Diego. The record reveals that Saenz did in fact sign a letter to the bank directing them to send surplus accounts to the bank in San Diego. Other grand jury testimony of the Petitioner reveals that he did tell the grand jury that someone connected with the City of Benavides would have instructed the bank in Dallas to forward the funds to the San Diego Bank. (R. 167) The only evidence in the record that Saenz knew that the funds were being transferred was testimony by an employee of the Mercantile Bank in Dallas that he sent a letter to Saenz dated April 15, 1967, informing him the funds were being transferred to San Diego and giving the amount of the funds. (R. 118) The witness admitted he did not know if it was ever received. (R. 128)

The withdrawal of $5,000.00 by the Petitioner was made on August 22, 1967. His grand jury testimony was given on October 13, 1972.

A former member of the city council, Ramiro Carrillo, testified that in fact there was a discussion of compensation for the mayor, but that it was not voted on and there was no amount discussed. (R. 208; 220) Carrillo testified that there had been no authorization to withdraw any amount as compensation for himself. His testimony was that he didn't think that the city council agreed that Mayor Saenz could pay himself additional compensation. (R. 210)

Another city councilman, Jose Gutierrez, testified that he did not remember any compensation being authorized for the mayor. Gutierrez admitted not attending many of the meetings. (R. 238)

Another City Council member, L. S. Chapa, testified that he did not recall any discussions of any extra amounts being paid to Saenz. (R. 244) He also admitted not attending all of the meetings of the city council. (R. 246) He also admitted that his memory was poor. (R. 247)

At the close of the government's evidence, a detailed motion for judgment of acquittal was made by defense counsel. (R. 251-254) Saenz testifying on his behalf, stated he did not recall ever seeing the letter bearing his signature (Government Exhibit 12) addressed to Mercantile Bank of Dallas. It is undisputed that Saenz reported the $5,000.00 on his income tax for that year as compensation from Benavides.

The Court found as a matter of law that the testimony given by the Petitioner before the grand jury was material to the grand jury investigation. (appendix)

The subject of the grand jury investigation, George B. Parr, was subsequently tried and convicted in the Southern District of Texas after the indictment in the Western District of Texas was dismissed. *United States v. Parr*, 509 F.2d 1381 (5th Cir. 1975)

REASONS FOR GRANTING THE WRIT

I. The Conviction Of Petitioner Raises Substantial Questions About The Burden That The Government Must Carry In Prosecuting For False Declarations Before A Grand Jury.

Bronston v. United States, 409 U.S. 352 (1973) dealt with a literally true but unresponsive answer. The case at bar presents a more complex situation. In *Bronston*, the defendant's answers "were shrewdly calculated to evade." Here the answers of the defendant were not shrewd and did not mislead the grand jury since they were apparently in possession of information that indicated to them a falsity in Petitioner's testimony that he had not left instructions with the Mercantile Bank.

The testimony of Saenz before the grand jury shows that after five years he had difficulty in recalling the transactions. The city councilmen called by the government also had memory problems. This raises the spectre of a man having been convicted because of

his and others faulty memory. It is incredible that Saenz would knowingly falsify facts so easily proven by third parties.

The government's case as to count one is exceedingly weak in as much as not all of the city councilmen testified and of those who did two admitted to poor attendance and admitted to a discussion of some type of compensation for Petitioner. It is not surprising that the councilmen and the mayor might differ since over five years passed from the taking of the compensation to the time of the grand jury testimony.

Since the two witness rule is statutorily abrogated, this Court should clarify what will be a sufficient case in prosecutions under § 1623. The case at bar presents an excellent opportunity for the Court to do so since in the two counts it presents different problems of proof. Taken as a whole, the testimony of Saenz does not sufficiently indicate perjury. The grand jury at least in an effort to be fair could have shown Saenz the bank correspondence so he could have attempted to recollect it rather than unfairly browbeating him. The various problems of recollection, perception and falsification, have been most enlightingly discussed by Professor Wigmore. Wigmore, *Principals of Judicial Proof* § 191 et seq (2nd ed. 1931)

Murky questions and murky answers should not be allowed to support a perjury conviction. *United States v. Paolicelli*, 505 F.2d 971 (4th Cir. 1971 dissenting opinion by Circuit Judge Craven.)

Even though the two witness rule has been abrogated, conviction ought not stand on oath against

oath nor upon a faulty memory. See *Weiler v. United States*, 316 F.2d 481 (7th Cir. 1963).

The precision required by *Bronston* is not present and this Court should so hold.

II. The Courts of Appeal Have Erroneously Held That The Issue Of Materiality In A Perjury Case Is One Of Law Thereby Depriving The Accused Of His Right To A Trial By Jury.

A finding of materiality has been a requirement of a perjury conviction since 1873. Act of December 1, 1873, 18 Stat. 1050 Ch 4, § 5392. Since the famous case of the lady in Earl Carroll's bathtub, the issue of materiality has been held to be one of law. *Carroll v. United States*, 16 F.2d 951 (2nd Cir. 1927) cert. denied, 273 U.S. 763 (1927) *Carroll* formulated the test that testimony is material if it "tends to influence or impede the course of the investigation." *Carroll, supra* at 953. The *Carroll* decision and subsequent cases citing it have been severely criticized. Lillich, *The Element Of Materiality In The Federal Crime Of Perjury*, 35 IND. L. REV.1 (1959) *Carroll* cited as to only federal authority dictum from a district court case, *United States v. Singleton*, 54 F. 488 (S.D. Ala. 1892) Prior to *Carroll* the law was that where facts were in dispute the issue was one of fact. *United States v. Shinn*, 14 F. 447 (C.C. Ore. 1882)

The district court in the case at bar entered an order of materiality (contained in the appendix) on the basis of testimony given at trial, as required by the Fifth Circuit. *United States v. Mancuso*, 485 F.2d 275 (5th Cir. 1973)

Similar types of issues have been held to be issues of facts. Lillich, *The Element Of Materiality In The Federal Crime of Perjury*, 35 IND. L. REV.1 (1959) and authorities collected at note 54, p. 10. Some cases go so far as to call materiality an issue of fact for the Court. *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973)

This Honorable Court should once and for all uphold the perjury defendant's right to jury trial under the United States Constitution Article III § 2 and Sixth Amendment.

III. The Scope Of A Grand Jury's Investigation Is One Of The Utmost Importance And The Courts Of Appeal Are In Conflict.

The United States Constitution, Sixth Amendment provides that a defendant shall be tried in the State and District where the offense occurred as does Fed. R. Crim. Pro. 18. George Parr was tried and convicted in the Southern District of Texas for offenses occurring in that District. *United States v. Parr*, 509 F.2d 1381 (5th Cir. 1975)

The grand jury in San Antonio had no jurisdiction over offenses occurring in the Southern District and thus the investigation of Parr was not a matter properly before the grand jury. Indeed the indictment was dismissed because the grand jury was without authority to return it. The holding of the court below is in conflict with *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957)

The opinion below is also in conflict with the *Plan for the Random Selection of Grand Juries and Petit Juries in the Western District of Texas* which provides in pertinent part "grand juries shall consider only cases triable in the division or divisions from which grand jurors are drawn." The *Plan* is approved by the Fifth Circuit.

The only excuse for investigating Parr in the Western District is that the returns were filed in the Austin Division of the Western District under the *Plan*. The jury had no authority over offenses occurring in the Austin Division.

Thus, it appears that the Petitioner was convicted for perjury before a grand jury that was without authority to investigate the matter it questioned him about. This matter should be clarified and resolved.

IV. The Supreme Court Should Hold That Testimony Before A Grand Jury That Is Not Believed At The Time It Is Given And In No Way Impedes The Investigation Is Not Material.

The questions asked of the Petitioner seemed more an effort to elicit false statements rather than useful information. The grand jury obviously already knew about the letter to the Dallas Bank and that city council members did not know of the $5,000.00 withdrawal. After subjecting the Petitioner to sarcastic taunts such as "lord mayor", the grand jury let the Petitioner know in no certain terms that it did not believe his testimony. The foreman told Petitioner that they thought he was not telling the truth and was perjuring

himself. It cannot be said that the grand jury was in any way hampered or misled.

It was easily shown that Parr indirectly received $33,000 from the City of Benavides account and that he did not pay taxes on it. Whether the $5,000.00 received by Saenz was related could have no material or probative effect on tax evasion by Parr. Neither correspondence or lack of correspondence between Saenz and the Mercantile Bank have had any materiality.

It has been held that for a statement to be material, it must at a minimum lead to further fruitful investigation. *United States v. Freedman*, 445 F.2d 1220 (2nd Cir. 1971) (Holding a statement not material though false); *United States v. Provinzmano*, 333 F. Supp. 255 (E.D. Wis. 1971) The argument made by Petitioner has been rejected in *United States v. Lee*, 509 F.2d 545 (2nd Cir. 1975) and *United States v. Carson*, 464 F.2d 424 (2nd Cir. 1972).

There is furthermore no evidence in the record as to whether the testimony of the Petitioner impeded the grand jury. Such testimony is required. *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973).

CONCLUSION

For the reasons stated herein, a writ of certiorari should be issued to reverse the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of August, 1975.

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Octavio SAENZ, Defendant-Appellant.

No. 74-3451
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 21, 1975.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, and GODBOLD and GEE, Circuit Judges.

PER CURIAM:

Appellant Octavio Saenz appeals his conviction for making false material declarations before the grand jury in violation of 18 U.S.C. § 1623. He alleges there was insufficient evidence, that the declarations were

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

not material to the issue before the grand jury, and that the court did not comply with Rule 32(a)(1) F.R.Cr.P., in sentencing him. We have reviewed the record and find these allegations to be without merit. The conviction is affirmed.

Appellant is the mayor of Benavides, Texas, a position he has held since 1955. Appellant was convicted of lying to the grand jury about the reason he withdrew $5,000 from a bank account styled "City of Benavides Special Sinking Fund," and his involvement in and knowledge of the opening of the account. In 1972, a federal grand jury in San Antonio began an investigation of George B. Parr for tax evasion. Parr was eventually convicted, and his conviction has been affirmed by this Court. Parr was counsel for the Duval County Water District, and there was much evidence that Parr had used water district funds for his own use. See United States v. Parr, 509 F.2d 1381 (5th Cir. 1975). Parr purchased irrigation equipment from a company in Houston and paid for part of it from the City of Benavides Special Sinking Fund. The fund had been established when a bank in Dallas returned some $39,000 to the city after bonds were paid for. Though the draft for some $33,000+ worth of equipment was drawn on the water district, the account was paid with Benavides funds. The bank was unable to explain the reason for this.

Five days after the $33,000+ draft, appellant withdrew $5,000 from the same account for himself. The grand jury questioned appellant about the two transactions. He denied any knowledge of the $33,000+ withdrawal. He testified the $5,000 was compensation for his services and had been agreed to by the city council.

Appellant denied knowing when the sinking fund was established, how much money was deposited, or giving the Dallas bank instructions to transfer the money to the local bank.

At trial it was established that the city council had never authorized the $5,000 to appellant. A Dallas banker, Banyon, testified about appellant's instructions to him regarding the transfer of the money. There was also evidence of appellant's signature on the signature cards.

Appellant took the stand and denied remembering any transactions with the Dallas bank. He admitted the genuineness of his signature.

Viewed in the light most favorable to the government, and drawing all reasonable inferences therefrom, there was sufficient evidence to convict appellant of false testimony before the grand jury. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941). Appellant's testimony was contradicted on both counts and in regard to both instances in the indictment. The question of credibility was for the jury. They simply did not believe appellant when he did not remember any transactions, seeing any letters, etc., regarding the opening of the sinking fund, while yet identifying his signature on the signature card required to open the account. The city council contradicted his story about the $5,000.

Appellant next alleges his testimony was not material to the grand jury's investigation of Parr. Appellant did not raise this matter at trial, though the trial judge made an express finding of materiality.

Materiality is a legal question to be decided by the court alone. The test is whether the false testimony was capable of influencing the tribunal on the issue, or whether it would have the natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation. *See* United States v. Gremillion, 5 Cir., 1972, 464 F.2d 901, 905, and the cases cited therein.

One of the grand jury members testified to its inquiry regarding Parr and the expenditure of City of Benavides funds for him or the water district. They were interested in people who were parties to the transaction, parties such as Saenz must have been, given his establishment and control of the sinking fund. When Saenz' testimony is looked at in respect to the large cash withdrawals from the city fund, it would tend to influence, impede or dissuade the grand jury on the issue of the involvement of Parr in these matters. The testimony was material.

Finally, appellant alleges the court did not comply with Rule 32(a)(1), F.R.Cr.P., because when it sentenced him, it read from a typed judgment. A review of the record reveals that both appellant and his counsel were allowed to speak on appellant's behalf before he was sentenced. The record does not reveal whether the court read its judgment; however, the rule was complied with, thus appellant has no ground for complaint.

A review of the record reveals no other errors of law.

Affirmed.

United States District Court
Western District of Texas
San Antonio Division

UNITED STATES OF AMERICA,
Plaintiff,
versus Cr. No. SA-74-CR-92

OCTAVIO SAENZ,
Defendant.

AMENDED ORDER OF MATERIALITY

On this the 27th day of August, 1974, the Court, after considering the evidence presented in the above styled and numbered cause, finds that the declarations charged in each of the two counts of the indictment were material. Specifically, the Court finds that the subject of these declarations incident to the withdrawal and expenditure of funds of the City of Benavides, Texas, and the Duval County Conservation and Reclamation District, was material to the investigation of a grand jury of the United States and that, if false, the declarations would impede the progress of that investigation.

Accordingly, IT IS SO ORDERED this the 27th day of August, 1974.

/s/ D. W. SUTTLE
UNITED STATES
DISTRICT JUDGE

United States Constitution Article III § 2 Clause 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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18 U.S.C. § 1623

§ 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made,

the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

Fed. R. Crim. Pro. 18

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

As amended Feb 28, 1966, eff. July 1, 1966.

Testimony of Petitioner before the Grand Jury as admitted in the Record pages 147-194.

[147] . . . contained in that trancript and I will ask you please to read the responses of Octavio Saenz. Is that agreeable?

A Yes, sir.

Q Beginning on the first page of the transcript.

"Q Will you state your name, please, sir?

A Octavio Saenz.

Q And Mr. Saenz, where do you live?
A I live in Benavides."

MR. CLARK:
Turn to page 141, please:

"Q All right. Mr. Saenz, you are the mayor of Benevides, are you not?
A Yes.
Q And how long have you been the mayor?
A I believe it's since 1955.
Q You were first elected in 1955 or '56; is that right?
A Right.
Q And you've been re-elected, I guess, several times since then?
A Yes, sir.
Q What is the mayor's term, two years or four years?
Q Well, it was three years. Now it's been changed to four years.
Q When were you last re-elected?
[148] A I don't remember. I should be coming up for election next year. Wait a minute, year after next, I believe.
Q What form of city government does Benevides have? Is there a city council?
A Yes, sir.
Q And a city manager? Or is it just a council?
A No, just a council.
Q Are the city councilmen salaried?
A Not now, no.
Q Do you receive a salary as mayor?
A Well, I have received a salary for mayor.
Q Well, when you say you have —
A A set salary, you mean?

Q Yes, sir.

A No.

Q Does the city compensate you in any other way besides a fixed salary?

A Well, they have, yes.

Q Regularly?

A No.

Q What is your occupation then besides being the mayor? What do you spend your time doing?

[149] A I'm a retired railroad worker. I worked the railroad and retired three years ago.

Q All right. What railroad did you work for?

A Tex-Mex. Texas-Mexican Railroad Company.

Q How long did you work for them?

A 50 years.

Q That's a long time.

A It is.

Q What did you do for the railroad company?

A I started as a messenger boy in 1920 and ended as a station agent in Alice in 1970.

Q Mr. Saenz, are you familiar with the bank account at the First State Bank of San Diego called City of Benevides Special Sinking Fund?

A Am I familiar with it?

Q Yes, sir.

A No, sir.

Q Let me show you a photocopy of a signature card from the First State Bank of San Diego on an account styled City of Benevides Special Sinking Fund, and the card appears to be signed by you as mayor and S. Garcia. I guess that is Santigo Garcia, is it not?

A Yes.

Q And that is your signature on the card, [150] isn't it?

A That's right, it is.

Q All right. This card is dated April 2, 1967 or April 2, 1969. I can't tell which, can you?

A Looks like —

Q Looks like it's either 1967 or '69, the date?

A It's '67. Looks like '67.

Q All right. Does that help you recall now the special sinking fund?

A Yes, I recall that.

Q All right. What is the City of Benevides Special Sinking Fund?

A Well, I really believe that that fund was established to take care of any money that would be left after the transaction, you know, of the —

Q After what transaction?

A When the utilities and the one sold on the what we call the water district.

Q All right. The city of Benevides sold the water and sewer systems, its water and sewer systems, to the Duval County Conservation and Reclamation District, didn't it?

A Yes, sir.

Q And is it your recollection then that [151] the money that went into the special sinking fund was what, some surplus money that was left over after that sale?

A I would imagine it was, yes, sir.

Q All right. Do you have any more specific recollection of the source of that money?

A No.

Q Is that an active account, Mr. Saenz?

A I don't know. I don't think so.

Q Well —

A You mean an active account now?

Q Yes, sir.

A I don't know. We never have received any statements or anything that the account is active.

Q You don't receive bank statements on it then?

A No, sir.

Q It's not the one that you and Mr. Garcia write checks on regularly then?

A No, sir.

Q Who writes the checks for the city of Benevides on the regular account?

A You mean the utilities account and things like that?

Q Well, let's start at the beginning [152] then. What bank accounts do you have at the city?

A Well, we have what we call City of Benevides Utilities Department or City of Benevides Fund Utilities, and we have what I have there which is a general tax fund, and I believe that's it.

Q So you have two bank accounts then; is that it? Two checking accounts?

A Yes, sir.

Q Now, were you able to bring with you, Mr. Saenz, the cash receipts journal of the city of Benevides?

A No, sir. We don't have it. And that checkbook there tells everything that the city of Benevides general tax fund has, and I think you'll find there the receipts and the checks that are paid out. It's just a small account. We don't collect taxes.

Q All right, sir. May I open this envelope here?

A Yes, sir.

Q So what we have here is a checkbook with checks and check stubs in it. And what account is this called?

A That's what we call the City of Benevides general tax fund.

[153] Q All right. Also included in this checkbook here in the back of it are some cancelled checks and

bank statements. Now, these bank statements and cancelled checks you get regularly, I suppose, don't you?

A I imagine so.

Q They come to the city from the bank?

A From San Diego.

Q From First State of San Diego?

A Correct.

Q And generally, what's the nature of the expenditures that are made out of this bank account?

A The nature of the expenditures out of that bank account are nothing but a few street lights that we have out there, and the receipts are a little token payment that CP and L makes to us and the telephone company, like a two percent receipts or taxes, something like that.

Q All right. Do Central Power and Light Company and the telephone company then make some payments to the city of Benevides instead of paying taxes; is that it?

A Well, no. Because when they pay taxes, they also pay this.

Q All right. So what is the nature then [154] of this additional token amount that they pay?

A Well, it's just — they call it something like a sales tax or a gross receipts tax or something like that. In other words, they do that voluntarily?

Q They just voluntarily pay that tax?

A Them and the telephone company.

Q And it bears some relationship to the amount of sales that they have in the City of Benevides; is that it?

A It all depends on how much their gross receipts are, and they mail us a small percentage on it.

Q All right. Now, you do not have then any bank statements or cancelled checks or deposit tickets for

the bank account that is called City of Benevides Special Sinking Fund?

A No, sir.

Q What happens to those bank statements? The bank just does not mail them to the city; is that right?

A That's correct.

Q Does the bank hold them?

A I don't know.

Q Hold them at the bank?

A I don't know.

Q In other words, it's just not an active account so it doesn't make any difference really whether [155] you get the statements or not; is that it?

A Well, we just didn't get them. We have not been getting them.

Q All right. Now, what about the cash receipts journal of the city? Is there a cash receipts journal?

A No, sir. You mean, of that particular fund there?

Q Well, for any account or for the city as a whole?

A No. We don't keep a journal on that. It's such a small amount.

Q You just keep your records in your checkbooks?

A On the checkbooks.

Q On the check stubs?

A Yes.

Q Mr. Saenz, the records of the First State Bank of San Diego indicate that the City of Benevides Special Sinking Fund Account was opened on April 11, 1967 with a deposit of $39,328.05. So I think that the date on this signature card probably is April 2, 1967. Now, do you recall that checking account, the special sinking fund account was opened about that time with some money?

[156] A I recall signing the card, but I didn't know

how much money was there or if there was any money at all.

All right. Let me show you — this is a picture of the bank's copy of the account ledger sheet or bank statement for the special sinking fund, and it shows on April 11, 1967, a deposit of $39,328.05, and that statement indicates that there was no balance before April 11. So it looks like that account was opened about that time.

A About that time.

Q Now, on August 17, 1967, there was a withdrawal from that account in the amount of $33,007.60. Did you have any knowledge of that withdrawal?

A No, I did not.

Q Have you learned anything about it since it was made?

A No, sir.

Q So you still don't know anything about that withdrawal even today?

A That's right.

Q All right. Then five days later on August 22, 1967, there was a withdrawal of $5,000. Now, do you have any knowledge about that transaction?

A $5,000?

[157] Q Yes.

A I think I have.

Q All right. What is your recollection of that? What can you tell us about that transaction?

A Well, I don't remember in what form it was withdrawn. Do you have anything?

Q Well, let me show you — here's the account ledger sheet from the bank for July 31 through August 22, 1967.

A Yes, sir.

Q Now, this shows a withdrawal of $33,007.60 on

August the 17th, and August 22nd a second withdrawal of $5,000.

A Um-hum.

Q Leaving a balance of $1,320.45 in the account, and it appears that there has not been any more checking activity in the account since that time. I think I have here a copy of the most recent ledger sheet. Here's a copy of the ledger sheet dated August 31, 1972, which indicates that still at this time there is the same $1,320.45 in it, so between August of 1967 and August of 1972 there were no additional withdrawals or deposits.

Now, what can you tell us about either the $33,000 withdrawal or the $5,000 withdrawal?

[158] A I don't know anything about the $33,000 withdrawal.

Q All right. You know nothing at all about that?

A Nothing at all.

Q All right. What can you tell us about the $5,000 withdrawal?

A Well, let's see, was it made in the form of a check or —

A Well, what I want is what you know about it, Mr. Saenz. So apparently that one does ring a bell with you, the $5,000 withdrawal.

A Yes, sir, it does.

Q And I need to know what you know, what you know about that transaction.

A Well, in August of 1967 — well, that might be a withdrawal that I made myself.

Q All right, sir. What was the purpose of that withdrawal?

A The purpose of the withdrawal was a compensation that was agreed on by the council for my services.

Q For you?

A Yes, sir.

Q All right. What was the basis of that [159] agreement?

A It was just compensation for my services and for so many years of work. Salary or whatever you might call it.

Q All right. And the city council agreed on that, did they?

A Yes, sir. They agreed. They had agreed whenever there was money available.

Q When does the city council meet? How often?

A Not very often, but we're supposed to meet the second Wednesday, but since we don't have very much except what that book shows there, we don't meet regularly.

Q You don't ordinarily have in any of the other city of Benevides checking accounts as much money as $39,000, do you?

A No, sir.

Q The other accounts are much smaller than that; isn't that right?

A Well, the other accounts — you mean this account and the other account?

Q Yes, sir.

A They should be much smaller than that.

Q Was the $5,000 payment to you voted upon by the city council at a formal meeting?

A I'm pretty sure it was, yes, sir. It's been quite some time, but I had authority to do it.

Q All right. What took place at that meeting then?

A Well, I can't think what took place, you know. I just asked if they didn't think that I was entitled to some kind of compensation for my services and all of that, you know, before we transacted the sale to the water district, and they agreed that if and when money was available it would be all right with them.

Q Had there been any compensation paid to you by the city of Benevides for your services as mayor before that time?

A Nothing but a small bonus or something like that, $40 or $50 a year, something like that.

Q Was that done every year?

A Nearly every year, yes, sir.

Q Has that compensation continued since 1967?

A Yes, sir, it has.

Q They still vote you a small bonus once a year then?

[161] A Yes, sir.

Q At any particular time of the year, end of the year?

A At the end of the year, yes.

Q Now, besides the small bonuses at the end of each year and the $5,000 compensation in 1967, have you received any other compensation from the city of Benevides during the period of time that you have been the mayor?

A No, just —

Q That's it?

A Just $50.

Q $50 a year?

A Right.

Q As a bonus?

A Right, sir.

Q Now, who is on the city council at the present time?

A At the present time is Juan Ramior Carrillo, J. G. Guiterrez, Pat Gonzales, and L. S. Chapa.

Q L. S. Chapa?

A Yes, sir. And there's another Canales, but — F. H. Canales, but he wasn't on the board at the time.

Q All right. With the exception of [162] Mr. Canales, were all of the other council members that you just named council members in 1967?

A I believe they were, yes, sir.

Q So you had the same city council there basically since 1967?

A Basically I don't think there's been any change.

Q Has the council ever voted any kind of bonus for themselves?

A Well, just this $50.

Q Do they vote themselves a $50 bonus also in addition to you?

A Yes, sir.

Q So you and the members of the city council then are all voted a $50 bonus each year?

A Well, we don't vote it every year, but it's a standing rule, you know, that — we call it Christmas bonus.

Q I see. But as to the $33,000 withdrawal in that fund, you have no knowledge of that?

A Not a thing in the world, no, sir. No knowledge at all.

Q Well, I think your recollection is pretty good as to the $5,000 withdrawal, Mr. Saenz. The records of the First State Bank indicate that you [163] did, in fact, draw a customer draft payable to yourself in the amount of $5,000 drawn on the City of Benevides Special Sinking Fund on August 21, 1967, which was deposited by you in your account at the First State Bank of San Diego. And that amount was reported by you on your federal income tax return for the year 1967 as miscellaneous income for services rendered the city of Benevides. That's the $5,000 we're talking about; isn't it?

A Yes, sir.

Q All right. Perhaps I can refresh your recollection with respect to the $33,000 transaction. Now, first of all, who knew that this $39,000 had been placed in this account and this account opened in 1967?

A I don't know.

Q Well, obviously you knew about it.

A No, sir.

Q Well, you signed the signature card.

A I signed the signature for the account, yes.

Q Yes, sir. You were not aware that the $39,000 was placed in that account?

A No, sir. I was aware that some money would be placed, but I didn't know the amount.

Q Well, all right. In August of 1967, [164] some four months after the account was opened, you knew at that time how much money was in the account, didn't you?

A No, sir.

Q Well then, how did you know you could write a $5,000 check on that account?

A I drew the draft and asked if there was enough money to cover that draft.

Q Why did you write it on the special sinking fund account?

A Because that was where we thought we would get some of that money that we had in Dallas.

Q Well, as a matter of fact, didn't you know as of the time you drew that draft that the money had been received and was in that account?

A Well, I knew that the money was received up to $5,000 because my check was honored, I mean, paid, but I didn't know how much money, how much more money was there.

Q Well, from whom did you learn that there was at least $5,000 in the account?

A Well, I asked if that draft was good at that amount of money at the window.

Q Who did you ask?

A Well, I don't remember. One of the [165] tellers where I had my deposit made, but I didn't ask any further questions on how much money was there.

Q You just asked if there were at least $5,000 in there so that draft would be honored?

A I asked if that draft was good, could be honored for that amount of money.

Q But it's your testimony that as of the time you walked up to that window you did not know how much money was in that account?

A That is correct. I didn't know and I don't know now.

Q Did you even know for sure that there was money in that account at all?

A Well, I figured there was money in the account, sir.

Q Well, what does —

A But not — I didn't know what amount of money was there.

Q Why did you believe that there was money in that account?

A I believed there was money in an account because when we signed that card we signed it so that if there was any money left at the bank in Dallas where we had this bank account, you know, [166] it would be transferred over to this account here if there was any money.

Q Well, did you leave instructions with the Mercantile National Bank of Dallas to transfer any surplus down to this account down at the First State Bank of San Diego?

A No, sir, I did not do anything like that.

Q Well then, who did you talk to about the signature card and the opening of this account?

A Well, I don't remember who I talked to, but we opened that account so that this money would come to that account if there was any money left. I mean, I mean that paying fund that we had over there in Dallas.

Q All right. You were dealing with the Mercantile National Bank in Dallas, I believe, weren't you?

A Yes, sir. They were the paying agents for —

Q All right. What were the instructions to the Mercantile National Bank as to where to send any monies that were left over?

A I can't recollect.

Q How did the Mercantile National Bank know that the money was supposed to go to the First [167] State Bank of San Diego to the special sinking fund account?

A I can't recollect, but it must have been some order to send it there, some instructions to send that money.

Q That's right. There had to be instructions to somebody to get the money into that account.

A Right. Yes.

Q Did you have any conversation with Barney Goldthorn at the First State Bank of San Diego about the opening of that account?

A No, sir.

Q Did you have any conversation with anybody at the bank about the opening of that account?

A No, sir.

Q Well then, how did the First State Bank of San Diego know to put the money in the special sinking fund account?

A I guess from that card we signed.

Q Just from the fact that you had a signed signature card?

A I imagine so, or there must be another authority somewhere.

Q Well, if you didn't give any instructions to the Mercantile National Bank of Dallas, I presume [168] that they would have simply written a check or draft to the City of Benevides, wouldn't they?

A More than likely, yes, sir.

Q And that draft had to get into the special sinking fund account at the First State Bank of San Diego somehow.

A Yes, sir.

Q Somebody had to receive the $39,000 and know that it was supposed to go into the special sinking fund account.

A I just imagine there were.

Q So either you or somebody at the First State Bank of San Diego had to know that that money was going into that account; isn't that right?

A Well, evidently, yes.

Q Well, how did the money come to the City of Benevides from the Mercantile National Bank?

A I don't know.

Q Did they send it to the city or did they send it to the First State Bank of San Diego?

A They didn't send it to the city. They just sent — they didn't send it to the city of Benevides because I didn't know anything about it.

Q Well, after you signed the signature card, didn't you make inquiries from time to time to find out [169] if the money had, in fact, reached the bank and been deposited in that account?

A No, sir.

Q Well, you were expecting some money to get deposited into that account?

A We were expecting some money to get deposited into that account, but we didn't know how much.

Q Weren't you curious enough to at least check with the First State Bank of San Diego once in awhile and find out?

A No, sir, I did not. I did not check with them.

Q Well, to a city the size of Benevides, $39,000 is a pretty substantial sum of money, isn't it?

A I agree with that.

Q More money than you ordinarily had in any other bank account that the city has; isn't that true?

A That's correct.

Q In fact, quite a bit more?

A Yes, sir.

Q And yet you made no inquiry to find out when the money got there?

A No, sir, I did not.

[170] Q What was the city's — what were the city's plans for the use of that $39,000?

A Well, we didn't know. We didn't know we had the money.

Q Does the city of Benevides —

A I mean that much money.

Q Does the city of Benevides have an annual budget?

A No, we just go by that book there because we don't collect taxes. We don't have any receipts whatsoever into that fund there.

Q You don't make any —

A There's two funds. The other fund is utilities fund, but that's — there is no budget made on that. That just goes on what he collects on gas and things like that, but this fund here, what's in that book, is all that

we get and all that we receive and all that is disbursed, what we call disbursed.

Q The city of Benevides makes no plans or forecast or budget concerning its anticipated expenditures for the coming year?

A No, sir. It's so small, you know, that we don't have very many expenditures except a few street lights, and no receipts except those taxes those people pay into the taxes, and that's all.

[171] Q All right. Now, the money that came back to the city of Benevides and went to the special sinking fund, of course, was the money of the city of Benevides, wasn't it?

A Yes, sir.

Q That belonged to the people of Benevides, in other words?

A Well, it belonged to the revenue bonds and things like that, sir.

Q Well, it was public money, wasn't it?

A Well, no. I don't think so. Not all of it.

Q Well, whose money was it?

A It was money that we collected from the revenue of the gas, water and sewer system.

Q All right. So it was paid by the public, wasn't it?

A Paid for services to the public, yes, sir.

Q All right.

A For the sale of gas and water and the rental on the sewer system and things like that.

Q Well, wouldn't you agree then that the money belonged to the city?

A Well, I would imagine it does, yes, sir.

[172] Q There's no question about it, is there?

A No, sir.

Q All right. What did the city of Benevides get for this $33,007.60?

A I don't know who withdrew it or whether it was withdrawn or by whom.

Q All right. Now, the $5,000 that went to you was for — was voted to you by the city council for services as mayor?

A Yes, sir.

Q So what the public got for that $5,000 was your services as mayor; right?

A Right.

Q You had no conversation with anybody about it?

A No conversation with anybody at all about it.

Q Nobody ever told you a word about what happened to that $33,000?

A No, sir.

Q Neither George Parr nor Barney Goldthorn?

A No, sir.

Q You have absolutely no knowledge?

A No knowledge.

[173] Q Never discussed that with anybody?

A Never discussed it.

Q How long have you known George Parr, Mr. Saenz?

A Oh, I've known him all my life."

MR. CLARK:

Turn to page 166, please —

Your Honor, I note that it is 12:00 o'clock and Counsel has reminded me of that fact. Does the Court wish to take a recess at this time?

THE COURT:

Well, I was wondering how much more you had.

MR. CLARK:

We are about half way through, Your Honor.

THE COURT:

All right. We will take the noon recess.

Members of the jury, you will keep in mind the cautionary instructions heretofore given you and kindly abide thereby. We will recess until 1:30 today instead of 2:00 o'clock.

Everyone please rise while the marshal retires the jury from the courtroom.

(The Court recessed from 12:00 noon to 1:35 p.m., August 27, 1974; Carol Hodge on the stand; jury in the box.)

[174] MR. CLARK:

Miss Hodge, I think we are ready to resume reading at page 166 of the transcript.

"Q Now, I'll ask you to search your recollection and to bear in mind that you are under oath to tell the truth and that the penalties for perjury are severe, and I'll ask you once again if it's not a fact that you did know about that $33,007.60 that was withdrawn out of the City of Benevides Special Sinking Fund.

A I did not know anything about it, so help me God.

Q Isn't it a fact that you discussed that with Barney Goldthorn at the time the withdrawal was made?

A No, sir.

Q You do know Barney Goldthorn, don't you?

A Yes, sir.

Q Isn't it a fact that you were told or you learned that Mr. Parr needed that $33,000 to pay for something he wanted to buy?

A No, sir. I don't know that."

MR. CLARK:

Questions by a juror:

"A JUROR:
Mr. Saenz, did you help negotiate the sale of your water company to the water district?

[175] THE WITNESS:
No, I didn't help. I didn't help.

A JUROR:
I thought you said part of your $5,000 compensation was because of the work that you put in on that.

THE WITNESS:
You mean actually worked on the negotiations and —

A JUROR:
Yes, the negotiations.

THE WITNESS:
Well, I would say that to a certain extent, yes.

A JUROR:
Then weren't you curious on the outcome of the money and disbursements after the sale went through of how much was actually taken in and how much was left over to transfer? Weren't you curious?

THE WITNESS:
Well, I was not, but I think that if you'll pardon me, that you're talking about the transaction between —

A JUROR:
Between Benevides —

THE WITNESS:
Benevides and the Duval County Water District, whatever you call it, and we're talking about — they're talking about another thing.

A JUROR:
No, I'm just interested in the transaction between the Benevides and the Duval County. Were you not involved in that in helping [176] negotiate the sale?

THE WITNESS:
Well, I was part of it.

A JUROR:
And wasn't that $39,000 a result of that transaction?

THE WITNESS:
No, sir. No, ma'am, pardon me.

A JUROR:
Excuse me.

THE WITNESS:
That money —

A JUROR:
What was it the result of? The $39,000?

THE WITNESS:
It was money that was paid into this fund to pay off bonds, due bonds, into bonds.

A JUROR:
You said that $39,000 came from the sale of bonds?

THE WITNESS:
No, sir.

A JUROR:
What did you just state?

THE WITNESS:
That money was put in the Mercantile National Bank in Dallas before this sale was made at the rate of about 1,000, $1200 a month, and later it amounted to about $2800 a month into the fund to pay off bonds or coupons as they matured. That money was on a special account or paying account in the Mercantile National Bank in Dallas.

A JUROR:
You knew it was going into [177] that fund and what was left was to be returned to the bank in San Diego?

THE WITNESS:
Well, if there was any.

Q (By Mr. Clark) Mr. Saenz, who keeps the checkbook that you have here?

A Mr. Garcia.

Q All right. Who keeps track of the utility fund bank account?

A Mr. Garcia.

Q And does he reconcile the bank statements?

A I just imagine so. Because he works for the water district also.

Q Well, does anybody reconcile the bank statements of the —

A — water district?

Q Of the utility account?

A I don't know. I have nothing to do with the utilities account except the gas revenue because the water and the sewer revenue is handled — is owned by the water district, and Mr. Garcia works for the water district and he collects some of that money too. He makes the deposits and collections.

Q Now, Mr. Garcia is not an employee of the city though, is he?

A Well, he's — you might say he's the [178] secretary, but he's not actually an employee.

Q He's actually employed by the conservation district, isn't he?

A Right.

Q Now, who deals with the bank with respect to the banking business of the City of Benevides?

A He does.

Q Who receives the bank statements and cancelled checks on the City of Benevides utility account and the other bank account which you've got here?

A We get this. I don't know about the utility, whether Garcia gets it or the water conservation district, but that other fund that we have that we call the utilities fund, Mr. Garcia gets that.

Q And he reconciles the bank statements on the utility fund account; is that right?

A Yes.

Q Is Mr. Garcia bonded?

A To be real honest with you, I don't know. I imagine he is of the water district.

Q Let me show you a picture of the deposit ticket on which that $39,328.05 was deposited in the special sinking fund. Here's a picture of it. [179] It's dated April 11, 1967, City of Benevides Special Sinking Fund, and it has on the check here as follows: "Mercantile National Bank deposit made to wrong account,

$39,328.05." Now, it also says on the face of it here "new account." Now, this is dated April 11, 1967 and corresponds to the date on the account ledger sheet showing that it was the deposit from the Mercantile National Bank that opened this account. Do you agree with that?

A Well, I think it is. What is this? Made to wrong account? What does that mean?

Q Well, what it means to me is that this $39,328.05 was first deposited to another account of the City of Benevides.

A Oh.

Q And then deposited to the special sinking fund.

A I see.

Q Now, here is a photograph of a deposit memorandum drawn on the utilities fund account, $39,328.05 on April 11, 1967. This was a debit memorandum of the First State Bank of San Diego, and it says as follows: "Mercantile National Bank remittance of bond funds deposited to wrong account, goes to special sinking fund account." Now, this is a [180] debit memorandum that is furnished by the bank to the city.

A Right.

Q And it shows on it that the $39,000 was first deposited to the utilities account and then changed and deposited to the special sinking fund account. So, Mr. Saenz, this debit memorandum is something that the city would receive along with the bank statement and the cancelled checks and the deposit ticket.

A That's correct.

Q So if you have looked at the bank statement, you would have seen, wouldn't you, that you got $39,328 on April 11th?

A Right.

Q And somebody reconciled that bank statement; right?

A That's correct. If they mailed them a copy of that memorandum to the city of Benevides, he should have had it.

Q Well —

A Because he gets bank statements every month for the utility.

Q This debit memorandum I assure you, was mailed to the city along with the cancelled checks [181] and the bank statements for that account as part of your bank statement.

A Yes, sir.

Q Now, you say Mr. Garcia is the one who receives these bank statements and reconciles them?

A That's correct.

Q All right. So Mr. Garcia would have seen this debit memorandum?

A If they mailed it, if they put it into the account.

Q Well, do you have any doubt of that?

A I don't know. I didn't see it. I don't reconcile those checks at all.

Q Mr. Saenz, when the $39,000 got to the First State Bank of San Diego originally, the First State Bank of San Diego credited it to the account of the utility fund.

A Yes, sir.

Q Somebody told the First State Bank, "No, that's the wrong account. You're supposed to put it in the special sinking fund account." Who told the First State Bank of San Diego that?

A I don't know.

Q Santiago Garcia?

A I don't think so.

[182] Q Who else knew about the account?

A Just Mr. Garcia and myself.

Q That kind of narrows it down to you, doesn't it?

A Yes, sir.

Q So you told the First State Bank that they had the money in the wrong account?

A No, I never did see those bank statements or anything that Mr. Garcia — I never have seen those things in, oh, 10 years or more.

Q Well, what did Mr. Garcia know about the special sinking fund account?

A I don't think he knew anything about it either.

Q Well, either you or Mr. Garcia, according to your theory, would have to have been the one who told the First State Bank of San Diego that they put the money in the wrong account.

A It wasn't me because I didn't know. I had no idea how much money was there in that account, and I didn't know that they had made the wrong — they had made the wrong deposit or anything at all about that.

Q And you weren't even curious enough to call the bank from time to time and find out if they [183] got it?

A I was not.

Q Mr. Saenz, let me ask you about that famous day when they chose to honor you with whatever was left over from those funds. What did the city council actually do that day?

A Well, you mean —

Q I say, what did they do in connection with that honorarium to you, yes, sir.

A You mean this —

Q Well, you had a city council meeting, didn't you?

A Yes, sir.

Q And who was there?

A Well, I can't think, but most of the members were there.

Q All right. Who would that be, sir?

A That would be Carrillo and Guiterrez and Pat and all those people.

Q Pat Gonzales?

A Yes.

Q And Mr. Chapa? Which Chapa?

A L. S.

Q Is that a man or a woman?

A It's a man.

[184] Q And you at that time had been mayor of the city for 12 years?

A Something like that.

Q It hadn't gone bankrupt during the time you were mayor, had it?

A Well, I think there was a bankruptcy case in Corpus.

Q Yes, sir. There was, wasn't there? The city did, in fact, go bankrupt while you were mayor?

A Yes, sir.

Q You do remember that?

A Yes, sir.

Q Now, on that day when they said, "We want you to be honored for your years of service," who said that?

A Well, I don't think those were the exact words.

Q Tell the jury what were the exact words.

A Well, the words were that I had asked that if they didn't think that I was entitled to a little compensation for all that, my work.

Q For what?

A For my work.

Q Over the 12 years as mayor?

[185] A Yes.

Q And then what happened?

A They all agreed.

Q And what was the amount?

A Well, we didn't know how much money we had.

Q So the amount was left up to you?

A Right.

Q Did they say, "That's up to you, Lord Mayor"?

A No.

Q What did they say?

A They said that it was all right if we had anything left out there.

Q I see. So you all had paid your bonuses to yourself over the 12 years at the rate of $50 a year, but their intention was for you to receive $5,000 for carrying them through a bankruptcy and a sale?

A I asked for it.

Q You asked specifically then for $5,000?

A I asked them for a compensation.

Q You asked them for how much?

A I didn't mention the amount.

Q Then, you are saying that the city [186] council did not know what they voted on?

A Well, they voted on giving me some kind of a compensation.

Q I see. And you were to decide how much that compensation would be?

A I decided that I was entitled to at least that much.

Q At least $5,000?

A Yes, sir.

Q When you did that, was that put on the minutes or was it just a friendly discussion?

A Just a discussion in the meeting.

Q I see. Now, you and Mr. Garcia were the only two on that signature card for a special sinking fund?

A Right.

Q And nobody else, is it your testimony — and I want to be clear on this — it is your testimony that you never knew when the money came into the account and how much it was?

A I'm certain of that.

Q Not even approximately when it came in or approximately —

A Not approximately.

Q So you didn't know whether it was [187] $5,000 or $105,000?

A No, sir.

Q And it's your testimony that to this day you didn't know, you just took a by guess and by gosh and went to the bank and said "Will this clear"?

A Yes.

Q And if it hadn't cleared, would you have put it in for $4,000 then?

A No.

Q What would you have done?

A I don't know. I can't say what I would've done.

Q Did the city council ever gather together the city people to honor Mayor Saenz and present him with the $5,000?

A I presented myself with the authority of the board.

Q Very quietly too and transferred it to another account immediately, did you not?

A To another account?

Q To another account, to your account in that bank? You didn't take it out and take it to the city council and say, "Thank you, city council," you just transferred to your own funds immediately?

A Well, the money was supposed to be mine.

[188] Q Did you ever go back to the city council and thank them for the money you took out?

A No.

Q Did you ever advise them how much you took out?

A No.

Q Because they weren't ever advised you were going to take it out. Isn't that so?

A They were advised.

Q They were not advised that you were going to take it out.

A They were advised that they were going to give that to me.

Q There never was a vote, was there, Mr. Saenz?

A Like I said, we had a conversation on that.

Q Was there ever a vote?

A I don't think so.

Q There never was, was there? Is that the way the City of Benevides operates, without voting?

A We cooperate.

Q Yes, you cooperate very nicely. There never was a vote?

A I can't remember, but there was an [189] agreement.

Q There is nobody in the city of Benevides who knows how much Mayor Saenz took from that account except Mayor Saenz, is there?

A No, sir.

Q Nobody knows how greatly they honored you?

A No, sir. I didn't steal that.

Q Does anybody know how greatly the city of Benevides honored you?

A No, sir.

Q Can I go down to Benevides today and say, "How much did you honor Mayor Saenz for his services?"

A No.

Q The councilmen?

A No.

Q And when you told me they don't know how much —

A They don't know how much.

Q Did Mr. Clark talk with you about perjury?
A Mr. who?
Q Mr. Clark. Did he talk with you about perjury?
A Yes, sir.
[190] Q Now, is it your testimony that you never talked with George Parr about that $33,000?
A That's correct.
Q Who did you talk with, sir?
A I didn't talk to anybody.
Q Yes, you did. You did, Mr. Saenz. The question is, who did you talk with?
A About the $33,000?
Q Yes, about the withdrawal for Mr. Parr.
A I didn't talk to anyone.
Q I see. So there is no connection between the withdrawal of that $33,000 and your $5,000 at all?
A No.
Q The fact that it fell within five days —
A No connection.
Q You didn't know that that check had been cleared?
A No.
Q There was no talk with Mr. Goldthorn?
A No.
Q No talk with Mr. Chapa?
A No.
Q No talk with any of the other city councilmen at all?
[191] A About the $33,000?
Q About the $33,000.
A No.
Q They don't know to this day it was taken out of there, do they?
A No, they don't know.
Q They don't know?

A And I didn't either.

Q Mr. Saenz, does the rest of the city council know that the city did receive $39,000?

A No.

Q Why not?

A I don't know. I didn't know.

Q Yes, you do know. You're the mayor.

A I don't know, because they don't know and I don't know.

Q Did the rest of the city council know that there might be some money coming back?

A They knew that there was some money coming back, yes, but they didn't know how much.

Q And you've never told them how much?

A No, sir, because I didn't know.

Q Well, you knew you got at least $5,000 back?

A Yes, that's correct.

[192] Q But you never told them that either?

A No, I didn't tell them anything about $39,000 because I didn't know myself.

Q What do you suppose their reaction would be if you went back and you went to the next city council meeting and told them that in April of 1967 the city got $39,000 back and it was put into the special sinking fund and that $33,000 of it was withdrawn shortly thereafter and that $5,000 was withdrawn by you shortly after that? What do you suppose their reaction would be?

A I don't know. I have no idea.

Q Do you think they might ask you where the $33,000 went?

A I don't know what they would ask.

Q Do you think they would ask you why you took $5,000 for yourself?

A I don't think they would, because they knew that

they had authorized me to draw some for compensation from them.

Q Now, you've been the mayor since 1956 approximately?

A '55, '56, yes, sir.

Q How many other times since you have been mayor has the city of Benevides ever spent $5,000 [193] at any one time for anything?

A I don't remember.

Q Can you remember any other time?

A I can't remember any other time.

Q How many times has the city of Benevides ever given $5,000 to anybody else besides you since you've been mayor?

A I don't know.

Q Never has, has it?

A I don't know that either, no, sir.

Q Well, as a matter of fact, you do know. They never have, have they?

A Well, not to my knowledge they haven't.

Q You hold the record, don't you?

A I imagine so.

Q Mr. Saenz, do you really and truly expect us to believe that you knew nothing about that $33,000?

A I want you to.

Q I know you want me to.

A I don't know, so help me God.

Q Do you really expect us to believe that you thought you were authorized by the city council to pay yourself $5,000?

A I believe that, because I was authorized. [194] But $33,000, I don't know anything about it.

Q Mr. Saenz, do you think you're talking to a room full of fools?

A I don't think so. A room full of ladies and gentlemen. But what I'm saying is the truth."

MR. CLARK:
Turn to page 189, please. Questions by a juror:

"A JUROR:
What are your duties? What do the people elect you to do for them?

THE WITNESS:
Just to keep incorporated as a city.

A JUROR:
And precisely what do you do to keep it incorporated as a city?

THE WITNESS:
Right now, we don't do very much because we used to collect utilities and sewer, but now the district does. Now we don't do anything."

MR. CLARK:
That is the end of the transcript, Miss Hodge. I do have other questions.

Q Have you read the original indictment in this case?

A Yes, I have.

Q Have you compared the testimony that's quoted in that original indictment with the transcript, the . . .

* * * *

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-216

OCTAVIO SAENZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction of perjury, that the false statements he was convicted of making before a grand jury were not material, and that the grand jury was without authority to investigate the matter it questioned him about.

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of two counts of perjury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of five years' imprisonment on each count and was fined $10,000 plus the costs of prosecution. The court of appeals affirmed (Pet. App. 1a–4a).

Petitioner is the mayor of Benavides, Texas. In May 1972, a federal grand jury in San Antonio commenced

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an investigation of suspected income tax evasion by George B. Parr, a prominent political figure in the South Texas county of Duval, in which Benavides is located. Included among Parr's activities was that of retained counsel for the Duval County Conservation and Reclamation District ("Water District") (Pat. App. 2a).

The grand jury's investigation had revealed that some of the Water District's bank accounts in the First State Bank of San Diego, Texas, had been used to make disguised expenditures on behalf of Parr. This was accomplished by billing the Water District's accounts for goods and services that had been provided for a large ranch in which Parr had an interest (Tr. 33–34). Among the items provided was $185,000 worth of irrigation equipment purchased from Stewart and Stevenson Services, Inc., of Houston. While most of this equipment was paid for by Water District funds, an initial invoice of $33,007.60 had been paid from funds from the City of Benavides Special Sinking Fund account at the First State Bank (Tr. 37–39, 41).

The Special Sinking Fund contained money originally held in the Mercantile National Bank of Dallas. In 1958, pursuant to federal bankruptcy proceedings, the fund had been established at the Mercantile Bank to provide for the payment of interest on City of Benavides Refunding Bonds of 1958. In 1967, the city's water and sewer systems were sold to the Water District, and the city's bonded indebtedness was paid off and cancelled. Thereafter, the remaining money in this fund, $39,328.05, was placed in a newly established City of Benavides Special Sinking Fund account at the First State Bank (Tr. 120–123, 204–205, 242–243).

The grand jury had interviewed officers of the bank, but they were unable to explain why this city account had been utilized to pay a fraudulent billing to the Water District (Tr. 41–42). Its investigation of the $33,000 expenditure revealed that five days after that disbursement petitioner had withdrawn some $5,000 from the city account (Tr. 43). These two transactions were the only two involving the city account from the time it was opened in 1967 (Tr. 39, 43).

Since petitioner's signature was on the bank card authorizing withdrawals from that account, he was questioned by the grand jury concerning these disbursements. The grand jury wished to determine why the account was established. It suspected that, since petitioner's withdrawal had occurred only five days after the $33,000 disbursement, it might have constituted a payoff to him for authorizing the $33,000 expenditure that had benefited Parr (Tr. 44).

When questioned by the grand jury as to the purpose of the $5,000 withdrawal, petitioner responded that it "was a compensation that was agreed on by the council for my services" (Tr. 158). This response was the basis for the first count of the indictment against petitioner, for the city council had not in fact agreed upon such compensation. City council members testified that the only compensation that they and the mayor were to receive was a $50 Christmas bonus each year plus free utility service (Tr. 202–204, 234–235, 243). Ramiro D. Carrillo testified that the council had never voted further compensation for petitioner (Tr. 208); that no entry in council records reflecting a desire to compensate him had been made

(Tr. 209); and that the council had never authorized petitioner to withdraw any city funds as compensation for himself (Tr. 210). Jose D. Gutierrez testified that petitioner had never discussed with the council the possibility of his receiving compensation for his services (Tr. 234, 236) and that he had never talked about his receiving funds from the sale of the Water District (Tr. 235). L. S. Chapa testified that there had been no discussion concerning further compensation for petitioner (Tr. 244); that no authorization of funds for any member beyond the Christmas bonus had ever been authorized (Tr. 244); and that the $5,000 payment to petitioner had not been authorized or voted upon (Tr. 245).[1]

When questioned by the grand jury about the Special Sinking Fund, petitioner indicated that, while he had signed the account signature card, initiating the account, he was not aware that the $39,000 had been placed in the account or when it had been deposited (Tr. 163, 186–187). He denied that he had instructed the Mercantile National Bank of Dallas to transfer the bond money surplus to the Special Sinking Fund account (Tr. 166). These responses were the basis for the second perjury count. The evidence showed that on March 15, 1967, petitioner had written to the Mercan-

[1] Petitioner testified that "my understanding with the council, our understanding was that if anything was left out of that [the money in the Mercantile Bank] we would compensate ourselves from whatever was left" (Tr. 304–305). The three council members, however, indicated that they did not know what had happened to the Mercantile Bank money and specifically that they did not know that it had been transferred to the First State Bank (Tr. 205–207, 234, 243).

tile Bank and requested the return of all funds remaining in the city's account; two weeks later he had signed a card establishing the City of Benavides Special Sinking Fund account at the First State Bank. On April 5, 1967, a Mercantile Bank officer wrote petitioner and indicated that the Mercantile account had been closed and that the $39,328.05 balance had been transferred to the First State Bank (Tr. 116–117, 118, 149–150).[2]

The grand jury was never able to determine if there had been a connection between Parr and petitioner or between the two withdrawals from the Special Sinking Fund. Parr was later convicted on four counts of attempted income tax evasion and four counts of filing false income tax returns. See *United States* v. *Parr*, 509 F. 2d 1381 (C.A. 5).

1. Petitioner contends that the evidence was insufficient to support his conviction. As our summary of the evidence reveals, however, his testimony before the grand jury was firmly contradicted by the government's evidence at trial. As the court of appeals stated, "[t]he question of credibility was for the jury" (Pet. App. 3a). *Bronston* v. *United States*, 409 U.S. 352, cited by petitioner is inapposite. In *Bronston* a perjury conviction was reversed because the defendant's

[2] At trial, petitioner stipulated that the signature on the March 15 letter was his own; however, he stated that he did not recall ever seeing the letter and that it was not typed by him or under his instructions (Tr. 264–265). He also asserted that he had never seen the April 5 letter advising him of the transfer of funds to the First State Bank account (Tr. 264–265). He denied ever having authorized the $33,000 payment to Stewart and Stevenson Services in Houston (Tr. 269).

response had been literally true and false only by implication. In petitioner's case, his answers were shown to be wholly false.

2. Petitioner also argues that the question whether a false statement was material should be determined by the jury rather than the court and that in any event his false statements were not material. The issue of materiality, however, has always been considered one of law for the determination of the trial court. See *Sinclair* v. *United States,* 279 U.S. 263, 298; *United States* v. *Wesson,* 478 F. 2d 1180, 1181 (C.A. 7); *United States* v. *Gremillion,* 464 F. 2d 901, 905 (C.A. 5), certiorari denied, 409 U.S. 1085. A false statement is material if it has "a tendency to influence, impede, or hamper the grand jury from pursuing its investigation." *United States* v. *Lardieri,* 497 F. 2d 187, 317, 319 (C.A. 3). Proof that the perjury actually impeded the grand jury is not necessary. *United States* v. *Lococo,* 450 F. 2d 1196, 1199 (C.A. 9), certiorari denied, 406 U.S. 945; *Vitello* v. *United States,* 425 F. 2d 416 (C.A. 9), certiorari denied, 400 U.S. 822; *United States* v. *Wesson, supra,* 478 F. 2d at 1181; *United States* v. *Gremillion, supra,* 464 F. 2d at 905.

Petitioner's statements tended to and in fact did impede the grand jury's investigation. Pursuant to its investigation of Parr, the grand jury was attempting to determine why the city had made an expenditure for Parr's personal benefit. Had petitioner truthfully revealed the reason for his withdrawal of $5,000 from the Special Sinking Fund and for his having established the account shortly before the $33,000 disbursement, the matter might have been resolved.

3. Petitioner argues that, because Parr was ultimately tried and convicted in the Southern District of Texas, the grand jury in the Western District—before which petitioner testified—was without jurisdiction over Parr's offenses and therefore that petitioner's perjury was unindictable. This contention was not made by petitioner in the court of appeals and should not be considered by this Court. See *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16; *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147, n. 2. In any event, the contention is insubstantial.

In the first place, jurisdiction over Parr's offenses did lie in the Western as well as the Southern District. A prosecution for attempted income tax evasion may be brought either in the district in which the return was mailed or in the district in which it was filed. See 18 U.S.C. 3237. We have been informed by the United States Attorney that, while Parr mailed his returns in the Southern District, they were filed in Austin, which is in the Western District.

A local rule in the Western District provides that "grand juries shall consider only cases triable in the division or divisions from which grand jurors are drawn" (Pet. 10). In this case, because Parr's returns were filed in Austin (in the Austin Division of the Western District) and the grand jury before which petitioner appeared was convened in the San Antonio Division, the initial indictment against Parr was dismissed. Rather than seek reindictment before an Austin Division grand jury, the government chose to seek reindictment of Parr in the Southern District.

Whatever may be the validity of the local rule, it does not confer a license to commit perjury. Whether a grand jury before which a witness is called ultimately has jurisdiction over the offenses it is investigating is immaterial in a perjury prosecution. A grand jury investigation is often designed to determine whether an offense has been committed within its jurisdiction. "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made." *Branzburg* v. *Hayes,* 408 U.S. 665, 701–702. That the investigation leads to the conclusion that no offense has occured or that an offense was committed in another district does not excuse the commission of perjury before the grand jury that conducted the investigation. "[T]he federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony." *United States* v. *Williams,* 341 U.S. 58, 68.[4]

Petitioner erroneously relies on *Brown* v. *United States,* 245 F. 2d 549 (C.A. 8). In *Brown,* a perjury conviction was reversed on a finding by the court of appeals that a grand jury had been convened without a good faith intent to investigate an offense that

[4] In *Williams*, the defendants were charged with giving perjured testimony during a criminal prosecution brought against them on the basis of an indictment later ruled defective. This Court rejected the contention that their perjury was thus immunized from prosecution. "The circumstance that ultimately it is determined on appeal that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment" (341 U.S. at 66).

might have occurred within its district, but solely to "extract from defendant his testimony * * * knowing that his recollection of it differed from that of * * * others * * * and to get him indicted for perjury" (245 F. 2d at 555).[5] In petitioner's case, by contrast, the grand jury's inquiry was clearly bona fide; there is no indication that, when the inquiry commenced, it was known that the suspected tax offenses under investigation had in fact occurred in another division or that there was a plan to extract perjured testimony from petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

[5] *Brown* has been limited by the Eighth Circuit to circumstances involving bad faith. See *Masinia* v. *United States*, 296 F. 2d 871 (C.A. 8); *LaRocca* v. *United States*, 337 F. 2d 39, 42–43 (C.A. 8).

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